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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON
AT SPOKANE

STATE OF WASHINGTON, et al., Plaintiffs, v. UNITED STATES DEPARTMENT OF HOMELAND SECURITY, a federal agency, et al. Defendants.	NO. 4:19-cv-05210-RMP PLAINTIFFS' REPLY IN SUPPORT OF MOTION TO COMPEL PRODUCTION OF PRIVILEGE LOG AND DISCOVERY ON COUNT IV Noted for: January 29, 2020 Without Oral Argument

I. INTRODUCTION

The weight of authority supports the relief Plaintiff States request. Plaintiffs seek: (1) to conduct limited discovery on their Equal Protection Claim; and (2) a basic description of the documents Defendants have withheld on the basis of privilege, so that Plaintiffs—and, if necessary, this Court—can evaluate whether Defendants have carried their burden in proving that a privilege applies. Both forms of relief are expressly contemplated by Federal Rule of Civil Procedure 26 and routinely provided as a matter of course.

Defendants insist that none of the usual rules apply because Plaintiffs have sued a federal agency. According to Defendants, any challenge to federal *agency* action—whether brought under the Administrative Procedure Act (APA) or not—is strictly limited to an administrative record compiled unilaterally by the very agency that has been charged with acting unlawfully. And when, as here, questions arise about information not included in the record, Defendants insist that the agency's decisions cannot be reviewed.

That is not the law in this Circuit. In arguing otherwise, Defendants misread precedent and misstate the weight of authority. Further, accepting Defendants' position would put agency action outside the reach of meaningful judicial review. Plaintiffs are no less entitled to prove their case because they assert both APA and constitutional claims, and Defendants must substantiate any claims of privilege they invoke. Plaintiffs' motion should be granted in full.

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II. ARGUMENT

A. Plaintiffs Are Entitled To Discovery On The Equal Protection Claim

1. The APA Does Not Displace Defendants' Discovery Obligations As To Independent Constitutional Claims

Under Federal Rule of Civil Procedure 26, Plaintiffs are entitled to discovery that is "relevant to any party's claim" and "proportional to the needs of the case." Fed. R. Civ. P. 26(b)(1). For APA claims, this standard typically limits discovery to the administrative record because APA-style judicial review looks only to the evidence that was before the agency. *See* Pls.' Mot. to Compel (ECF No. 195) (Mot.) at 9–10. On this point, Plaintiffs and Defendants agree. *See* Defs.' Opp. to Mot. to Compel (ECF No. 198) (Opp.) at 2–3.

Defendants, however, attempt to take that well-established and non-controversial rule one step farther. According to Defendants, *any* claims made against an agency "are governed by the APA," and therefore subject to the same "record-review limitation." Opp. at 2–3. But Defendants cite no authority—other than the APA itself—in support of their view that the APA sweeps so broadly. And even if there may be good reason to limit discovery in other challenges to agency action—which Plaintiffs do not admit—that is certainly not the case for claims that allege unlawful discriminatory purpose.

For those claims, Defendants appear to agree that "discovery is important where discrimination is alleged." Opp. at 6 (internal quotation marks omitted). As Plaintiffs have explained, that view is consistent with the weight of authority. Mot. at 9–12. Only through discovery beyond the administrative record can

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Plaintiffs—and eventually the Court—conduct the "sensitive inquiry into such circumstantial and direct evidence of intent as may be available" that allegations of "invidious discriminatory purpose . . . demand[]." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (noting importance of "searching judicial inquiry" to "smoke out" unlawful discrimination).

In arguing otherwise, Defendants misread Supreme Court precedent. According to Defendants, *Department of Commerce v. New York*, 139 S. Ct. 2551 (2019), supports their position because the Court "specifically concluded that the presumption of record review applied even where Plaintiffs brought equal protection and other constitutional claims." Opp. at 5. But a close read of the *New York* decision in the context of that case's litigation history confirms that the Court said no such thing.

Although it is true that the plaintiffs in *New York* originally brought an Equal Protection claim, that claim was not before the Supreme Court when it issued this decision. *New York*, 139 S. Ct. at 2563. Instead, the constitutional claim had been previously dismissed and was not at issue on appeal. *Id.* at 2564. Accordingly, the Supreme Court's analysis at 2573–74—on which Defendants here rely—involved only APA claims, *not* independent constitutional claims. *Id.* at 2573–74; *see also id.* at 2576 (describing requirements "under the Administrative Procedure Act"). Whatever the Supreme Court may have said

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about extra-record discovery for APA claims,[1] the decision says nothing about discovery on an independent constitutional claim. *See Mayor & City Council of Baltimore v. Trump*, No. CV ELH-18-3636, 2019 WL 6970631, at *8 (D. Md. Dec. 19, 2019) (agreeing that *New York* does not foreclose discovery on Equal Protection claims, and noting that "the government's cherry-picked quote [from *New York*] does not support its position").

Plaintiffs are therefore entitled to conduct the discovery they could otherwise seek had they brought only their Equal Protection claim. *See Webster v. Doe*, 486 U.S. 592, 604 (1988) (district court may allow discovery related to constitutional claims in APA case as balanced against countervailing concerns); *Grill v. Quinn*, No. CIV S-10-0757 GEB, 2012 WL 174873, at *2 (E.D. Cal. Jan. 20, 2012) (allowing "discovery as to the non-APA [constitutional] claim"); *Rydeen v. Quigg*, 748 F. Supp. 900, 906 (D.D.C. 1990) (considering affidavits outside the administrative record as to constitutional challenges), *aff'd*, 937 F.2d 623 (Fed. Cir. 1991).

Defendants do not contest that these decisions support extra-record discovery. *See* Opp. at 6–7 & n.2. Instead, Defendants' only response is to minimize the importance of discovery on the facts of those cases, or question whether those decisions were "properly decided." *Id.* at 7. By contrast, ample

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[1] Plaintiffs note that the Court held such discovery was "ultimately justified." *New York*, 139 S. Ct. at 2574.

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authority—from cases against federal defendants that also involved APA claims—supports Plaintiffs' entitlement to discovery here. *See Bolton v. Pritzker*, No. C15-1607 MJP, 2016 WL 4555467, at *4 (W.D. Wash. Sept. 1, 2016) ("[A] direct constitutional challenge is reviewed independent of the APA, and as such the court is entitled to look beyond the administrative record in regard to such a claim." (internal quotation marks omitted)); *Vietnam Veterans of Am. v. C.I.A.*, No. 09-CV-0037 CW JSC, 2011 WL 4635139, at *5 (N.D. Cal. Oct. 5, 2011) (explaining that government's "objection to discovery under the APA is misplaced" because the plaintiffs asserted a "constitutional claim"); *Damus v. Nielsen*, No. CV 18-578 (JEB), 2019 WL 1003440, at *4 (D.D.C. Feb. 28, 2019) ("The general rule, of course, is that discovery is not available in an APA case . . . . No such rule exists in constitutional cases."); *Nat'l Med. Enterprises, Inc. v. Shalala*, 826 F. Supp. 558, 565 (D.D.C. 1993) ("While it is generally true that the focal point for judicial review should be the administrative record already in existence, . . . there are a number of exceptions to this rule. Chief among these is a . . . constitutional claim." (internal citations and quotation marks omitted)), *aff'd*, 43 F.3d 691 (D.C. Cir. 1995).

Defendants rely on a handful of district court cases to argue that the APA's record limitation applies more broadly than the APA itself. *See* Opp. at 3–4. But most of those cases do not involve discovery for Equal Protection claims, and the two decisions where Equal Protection claims were addressed in the relevant

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discussion did not involve a suspect class.[2] By contrast, Plaintiffs here allege an unlawful "intent to discriminate on the basis of race, ethnicity, or national origin." Am. Compl. (ECF No. 31) ¶ 430.

Importantly, Plaintiffs' Equal Protection claim is not merely duplicative of the APA claims alleged here. As the Amended Complaint lays out, Plaintiffs contend that the Rule is invalid under the APA because: (1) it is inconsistent with several federal statutes (Count I); (2) DHS acted *ultra vires* in adopting the Rule (Count II); and (3) the Rule is arbitrary or capricious (Count III). Separately, Plaintiffs contend that the Rule violates the Fifth Amendment's Equal Protection guarantee because it was motivated by an unlawful discriminatory intent (Count IV). *See* Am. Compl. ¶¶ 415–33. The mere fact that Plaintiffs have asserted these claims together in the same lawsuit does not somehow displace Defendants' obligations under Rule 26.

2. Plaintiffs Have Made A More Than Adequate Showing To Permit Discovery To Proceed

In seeking to prevent all discovery, Defendants suggest Plaintiffs must conclusively *prove* their allegations of discrimination before seeking any

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[2] *Jiahao Kuang v. United States Dep't of Def.*, No. 18-CV-03698-JST, 2019 WL 293379, at *2 (N.D. Cal. Jan. 23, 2019) ("[n]o suspect class is alleged [for] the equal protection claim"); *Chiayu Chang v. United States Citizenship & Immigration Servs.*, 254 F. Supp. 3d 160, 162 (D.D.C. 2017) (same).

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information about them. *See* Opp. at 7–8. That argument substantially overstates Plaintiffs' burden. At this early stage in the litigation, Plaintiffs need to show only that discovery would be "relevant" to their claims and "proportional to the needs of the case." Fed. R. Civ. P. 26(b)(1); *see also Shoen v. Shoen*, 5 F.3d 1289, 1292 (9th Cir. 1993) (explaining that "discovery is ordinarily accorded a broad and liberal treatment" because "wide access to relevant facts serves the integrity and fairness of the judicial process by promoting the search for the truth" (quotation marks and citations omitted)).

Plaintiffs have proffered significant public-record evidence that is more than sufficient to carry their burden. *See* Mot. at 12–14. As Plaintiffs described in their motion, high-ranking Administration officials have made statements evincing animus toward immigrants of color. *Id.* at 12. Recently leaked emails suggest that one of these officials, Stephen Miller, is sympathetic to groups with white nationalist and anti-immigrant views. *Id.* at 13. And it is undisputed that Miller was deeply involved in the adoption of the Rule, including his demands on more than one occasion that the agency move faster. *Id.* at 7.

Whatever responses or explanations Defendants may have, *see* Opp. at 7–8 & n.3, such evidence more than satisfies Plaintiffs' minimal burden under Rule 26. It also guards against Defendants' suggestion that allowing discovery here would open the floodgates in every suit challenging agency action. *Id.* at 4–5. Plaintiffs have proffered specific evidence in support of their request to

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conduct limited discovery on this particular Equal Protection claim.

Nor are Defendants correct that Plaintiffs' Equal Protection claim is governed by the rational basis standard. *See* Opp. at 8–9. It is well settled that claims of discrimination on the basis of race or ethnicity "must meet strict scrutiny." *Fisher v. Univ. of Texas at Austin*, 570 U.S. 297, 307 (2013). And "equal protection claims do not necessarily receive rational basis review simply because they are in the immigration context." *Dent v. Sessions*, 900 F.3d 1075, 1081 (9th Cir. 2018). Although certain constitutional protections are unavailable to individuals outside the United States, that is not the case for those already here. The Fifth Amendment—including its Equal Protection guarantee—"applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent."[3] *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001). Accordingly, Plaintiffs' Equal Protection claim is subject to strict scrutiny, not rational basis. *E.g.*, *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1689–90 (2017) (holding that heightened scrutiny applied to gender-based classifications in INA's citizenship provision).

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[3] The two cases Defendants cite are distinguishable on this basis because they involved challenges to executive decisions regarding "the entry of foreign nationals" into the United States. *Trump v. Hawaii*, 138 S. Ct. 2392, 2420 n.5 (2018); *Mayor & City Council of Baltimore*, 2019 WL 6970631, at *10. The Rule here applies to individuals who are "lawfully present." Am. Compl. ¶ 15.

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In any event, even if the rational basis standard were found to apply here, that determination has no bearing on *whether* Plaintiffs may seek to prove their allegations. Instead, disputes about the applicable standard of review will only impact *how* the Court will eventually consider the evidence. Applying a lower standard would not block access to that evidence in the first place. *See Hawaii*, 138 S. Ct. at 2420 (noting that, in applying rational basis review, court "may consider plaintiffs' extrinsic evidence").

Finally, Defendants' attempt to further delay these proceedings should be rejected. Although Defendants request that any discovery be "postpone[ed] . . . until after resolution of a motion to dismiss," Opp. at 9 n.4, last month Defendants specifically agreed with Plaintiffs that these discovery disputes "should be resolved before [the parties] submit a dispositive motion briefing schedule and deadline for Defendants' responsive pleading," Status Report (ECF No. 193) at 2. Defendants requested a ruling on these discovery issues prior to submitting their motion to dismiss because "a decision on whether there will be discovery in this case could impact the schedule for dispositive motions and the scope of such motions." *Id.* at 3–4. Consistent with these representations, the parties have presented these issues to the Court for resolution, and Defendants may not now offer a contradictory view as to the proper sequence of this litigation. Likewise, Defendants should not be permitted to submit further briefing on this question. *See* Opp. at n.4. Plaintiffs' request to conduct limited

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discovery on their Equal Protection claim should be granted, and that discovery should proceed without further delay.

B. A Privilege Log Is Required To Evaluate Whether Defendants Have Properly Excluded Information From The Record

Defendants do not deny that they have withheld documents from the Administrative Record produced November 25, 2019. Nor do they dispute their burden to show that any privilege applies. *See* Mot. at 5. Instead, Defendants argue that, because privileged materials are not part of the administrative record, Defendants are entitled to *unilaterally* designate documents and withhold them on the basis of privilege, and those unilateral decisions are entirely shielded from judicial review. *See* Opp. at 9–15.

This audacious position is not the law of this Circuit. *See Inst. for Fisheries Res. v. Burwell*, No. 16-CV-01574-VC, 2017 WL 89003, at *1 (N.D. Cal. Jan. 10, 2017) ("[T]he government is wrong to assert that [potentially deliberative materials], as a categorical matter, should be excluded from the [administrative record]."); *Ctr. for Food Safety v. Vilsack*, No. 15CV01590HSGKAW, 2017 WL 1709318, at *5 (N.D. Cal. May 3, 2017) ("Defendants . . . have not pointed to binding Ninth Circuit authority that stands for the proposition that in an APA action, an agency may withhold documents on the basis of privilege without providing so much as a privilege log.").

Further, Defendants speak out of both sides of their mouth. Just last month, in another APA case in this Circuit, they voluntarily agreed to submit a privilege

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log. In *Doe v. Trump*, No. 3:19-cv-01743-SI (D. Or.), a case challenging the presidential proclamation requiring qualified immigrants to have health insurance or sufficient wealth in order to obtain visas, Defendants submitted a Joint Proposed Case Management Order that committed to "provide Plaintiffs with a privilege log . . . [of] any documents withheld or redacted under any claim or privilege other than the deliberative process privilege." Joint Proposed Case Management Order (ECF No. 116) ¶ 2 (Dec. 25, 2019) (attached as Ex. A to Decl. of Jeffrey T. Sprung in Supp. of Pls.' Reply Mem.). If, as Defendants argue, the law in this Circuit completely barred privilege logs in APA cases, they would not have voluntarily agreed to produce one.

Defendants argue that production of a privilege log is not "compulsory" in this Circuit (Opp. at 13), but this does not address Plaintiffs' argument. Plaintiffs contend instead that it is a proper exercise of this Court's discretion to order one here. Ninth Circuit authority confirms Plaintiffs' position. That Court has expressly held that it is *not* clear error to require a privilege log in APA cases. *In re United States*, 875 F.3d 1200, 1210 (9th Cir.), *vacated on other grounds*, 138 S. Ct. 443 (2017). Although Defendants make much of the fact that the *In re United States* decision has since been vacated, the Supreme Court's order said nothing about the propriety of privilege logs. *See In re United States*, 138 S. Ct. 443 (2017). And the mandamus posture of *In re United States* (*see* Opp. at 13–14) proves Plaintiffs' point, not Defendants'—if ordering a privilege log were

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clear error, the Ninth Circuit's decision would have come out the other way.[4] Further, the Ninth Circuit has adhered to its view, rejecting another more recent attempt by the Federal Government to vacate (on mandamus) an order requiring an agency to prepare a privilege log to accompany the administrative record. *See* Order (ECF No. 20) (denying petition for mandamus), Pet. for Writ of Mandamus (ECF No. 1), *In re Thomas E. Price*, No. 17-71121 (9th Cir. 2018).

In attempting to recast the weight of authority, Defendants effectively concede that at least two decisions by federal courts in this state support Plaintiffs' position. *See* Opp. at 12–15 & n.5. In both *Washington v. United States Dep't of State*, No. C18-1115RSL, 2019 WL 1254876 (W.D. Wash. Mar. 19, 2019), and *Kalispel Tribe of Indians v. United States Dep't of the Interior*, No. 2:17-CV-0138-WFN, 2018 WL 9391703 (E.D. Wash. Mar. 8, 2018), the courts ordered the Federal Government to provide privilege logs identifying documents that had been withheld.

These decisions are consistent with the Ninth Circuit's observation that "many district courts within this circuit have required a privilege log and in

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[4] The other Ninth Circuit case Defendants cite, *Cook Inletkeeper v. U.S. E.P.A.*, 400 F. App'x 239 (9th Cir. 2010), is not on point because the agency there explicitly "denie[d] that it considered the documents at issue." *Id.* at 240. Here, by contrast, Plaintiffs have identified several significant documents that were before DHS but not included in the record. *See* Mot. at 6–7.

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camera analysis of assertedly deliberative materials in APA cases." *In re United States*, 875 F.3d at 1210; *see also, e.g.*, *Indigenous Envtl. Network v. United States Dep't of State*, No. CV-17-29-GF-BMM, 2018 WL 1796217, at *3 (D. Mont. Apr. 16, 2018) (ordering federal defendants in APA case to provide privilege log); *Sierra Club v. Zinke*, No. 17-CV-07187-WHO, 2018 WL 3126401, at *4 (N.D. Cal. June 26, 2018) (same); *Ctr. for Food Safety*, 2017 WL 1709318, at *5 (same); *Inst. for Fisheries Res.*, 2017 WL 89003, at *1 (same); *Gill v. Dep't of Justice*, No. 14-CV-03120-RS (KAW), 2015 WL 9258075, at *7 (N.D. Cal. Dec. 18, 2015) (same).[5]

Accepting Defendants' position would allow the Federal Government to unilaterally curate the evidence without any record or review. But as Judge Lasnik recently ruled, "[a]n agency may not simply declare that it has withheld privileged documents without disclosing their existence, identifying the

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[5] Against the strong weight of authority in this circuit, Defendants cite only two opinions from district courts within the Ninth Circuit. The first, *California v. U.S. Dep't of Labor*, No. 2:13-CV-02069-KJM, 2014 WL 1665290, at *13 (E.D. Cal. Apr. 24, 2014), pre-dated the Ninth Circuit's recent discussion and (in one sentence) adopted a decision from D.C. The second, *ASSE Int'l, Inc. v. Kerry*, No. SACV1400534CJCJPRX, 2018 WL 3326687, at *3–4 (C.D. Cal. Jan. 3, 2018), apart from citing the above decision in *California*, likewise relied exclusively on authority from D.C.

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privilege asserted, or providing plaintiffs and the Court with enough information to test the assertion." *Washington*, 2019 WL 1254876, at *2. To ensure that judicial review under the APA proceeds on the basis of "[t]he *whole* administrative record," a privilege log is necessary. *Thompson v. U.S. Dep't of Labor*, 885 F.2d 551, 555 (9th Cir.1989) (emphasis added); *see* Mot. at 4–5.

Most of Defendants' arguments on this point go to the question of whether any assertedly privileged documents should be disclosed. *See* Opp. at 11–12. But those responses ignore the threshold question presented by this motion: Whether Defendants must even *identify* the documents that have been withheld. Regardless of whether certain privileges may ultimately be found to apply, Defendants cannot carry their burden without providing basic information about what the documents are and why they are allegedly privileged. Any objections Defendants will likely have to actually disclosing documents they claim to be privileged will be addressed in the parties' negotiations on the subject and, if necessary, further intervention by the Court.

Accordingly, none of the concerns Defendants identify about *disclosure*—including any purported risk to "the integrity of the administrative process" or the asserted potential for a "chilling effect" on agencies—are relevant to the first-order question of whether they should be required to merely *log* the documents that have been withheld. Opp. at 11–12. And, as Plaintiffs have explained, the fact that a privilege may apply does not necessarily bar disclosure of the

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privileged information. Mot. at 5. These potential issues highlight the precise reasons that Plaintiffs' motion should be granted.

C. Equal Protection Discovery And A Privilege Log Will Allow Discovery And Record-Related Disputes To Surface Without Delay

Recent litigation involving a citizenship question in the census underscores the need to fully consider discovery requests at the time they arise. Even after that case had been decided by the Supreme Court, the district court is still adjudicating a motion for sanctions based in part on those defendants' production of a "woefully incomplete" administrative record that failed to include (among other things) documents relating to contacts with the White House. *See* Mot. for Sanctions (ECF No. 635), *Department of Commerce v. New York*, No. 1:18-cv-02921, at 1–4, 13 (S.D.N.Y. July 16, 2019). Whatever the outcome of that motion, it highlights the importance of Plaintiffs' requests here. Without discovery on the Equal Protection claim and a privilege log to accompany the administrative record, neither Plaintiffs nor this Court will be able to fairly evaluate the allegations of discrimination or Defendants' assertions of privilege. Granting Plaintiffs' motion will ensure that any potential discovery issues or record omissions are brought to light as early as possible.

III. CONCLUSION

Plaintiffs' motion to compel should be granted as to both (1) discovery on Count IV, and (2) Defendants' production of a privilege log.

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RESPECTFULLY SUBMITTED this 28th day of January 2020.

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DECLARATION OF SERVICE

I hereby declare that on this day I caused the foregoing document to be electronically filed with the Clerk of the Court using the Court's CM/ECF System which will serve a copy of this document upon all counsel of record.

DATED this 28th day of January 2020, at Seattle, Washington.

/s/ Jeffrey T. Sprung
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